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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT GORDON, Plaintiff, vs. METROPOLITAN LIFE INSURANCE COMPANY, a corporation; DOES 1 through 10, inclusive, Defendants	NO. CV 10-cv-5399 EJD (HRL) PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT Date: August 27, 2015 Time: 9:00 am Courtroom: 4 Judge: Honorable Edward J. Davila

TO THE HONORABLE EDWARD J. DAVILA, AND TO DEFENDANT METROPOLITAN LIFE INSURANCE COMPANY AND ITS ATTORNEYS OF RECORD:

Notice is hereby given that on August 27, 2015, at 9:00am or as soon thereafter as the matter may be heard in courtroom 4 at 280 South 1st Street, San Jose, California, Plaintiff will move the court to order Judgement be entered on behalf of Plaintiff Robert Gordon and against defendant Metropolitan Life Insurance Company, pursuant to this court's Case Management Order from February 13, 2015.

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I. Facts of The Claim

A. MetLife Refuses To Decide Plaintiff's Appeal Prior To Litigation.

Mr. Gordon originally worked for Ashton-Tate from 1989 until it was bought by Borland Software in 1991. Mr. Gordon worked for Borland Software Corporation (Borland) from 1991 until April 19, 2002, at which time he became disabled due in part to mental/emotional problems. On May 1, 2002 Mr. Gordon returned to work and that same day Borland terminated his employment due to performance issues and his behavior at a meeting with HR about his performance issues. AR 1412[1]. That same day Borland sent a letter to Plaintiff claiming that his life insurance and disability coverage had ended. AR 1412. Mr. Gordon has been disabled since April of 2002.

On October 22, 2009 Plaintiff filed a claim seeking long term disability benefits through his employer provided benefit plan with Metropolitan Life Insurance Company (MetLife). AR 1439. On February 22, 2010, Plaintiff provided MetLife with 322 pages of medical records from 2000 to 2010 to support his claim. AR 1092.

On May 7, 2010 MetLife denied Plaintiff's claim based solely on its inability to verify Plaintiff's LTD coverage as an eligible employee with Borland. AR 1079. The denial letter stated, "Because your claim was denied in whole or in part, you may appeal this decision by sending a written request for appeal to Metlife Disability, [address omitted] within 180 days after you receive this denial letter." AR 1080.

On May 4, 2010 Plaintiff sent MetLife Borland Incentive Compensation Program Evaluations regarding the Plaintiff for 2001 and 2002, a Borland Performance Appraisal regarding the Plaintiff from April 1, 2001, Plaintiff's W-2s from Borland from 2000 and 2001 and a Borland payment summary from April 2002, and asked if there was anything else MetLife required in order to process his claim. AR 1064. Although these items were sent before MetLife denied Plaintiff's claim, it seems that MetLife did not get them until afterwards.

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[1] Plaintiff will refer to specific pages in the administrative record using the page numbers provided by MetLife. Plaintiff will provide the page numbers as AR followed by the last non-zero digits.

On May 25, 2010 Plaintiff provided MetLife with Borland's contact information including its website, the address of Borland's corporate office, and Borland's corporate office's telephone number, and asked for the plan document and SPD regarding his claim. AR 1057.

On June 22, 2010 Plaintiff again asked in writing that MetLife provide him the plan document and summary plan description and his entire claim file. Plaintiff also asked if there was anything else he needed to submit in order to perfect his claim. AR 1056.

After May 2010 MetLife effectively ignored all of Plaintiff's further correspondences, including his requests to be provided the plan documents and the administrative record regarding his claim, and inquiries as to what else he could provide to perfect his claims. MetLife's silence was only broken briefly on July 9, 2010, to inform Plaintiff's attorney that while MetLife possessed the plan documents and administrative record Plaintiff had asked for, they were not going to send him copies. AR 1054.

On August 11, 2010, well within the 180 day deadline, Plaintiff appealed MetLife's adverse benefit decision and again sought the plan documents and administrative record. AR 1053. **MetLife completely ignored Plaintiff's appeal**.

On November 29, 2010, more than three months after Plaintiff had appealed the denial of his claim, Plaintiff filed this action. Docket # 1.

B. After Plaintiff Files This Lawsuit MetLife Changes The Reason For Denying Plaintiff's Claim.

More than a year later, on December 9, 2011, the parties engaged in a mediation in which both parties agreed to a remand of the claim back to MetLife. On

January 24, 2012, this court approved the parties' joint stipulation regarding the remand and stayed the proceedings in this case until March 30, 2012. Docket # 25.

On March 30, 2012 MetLife notified Plaintiff that he did have coverage under the LTD Plan as a Borland employee (the only reason prior to this litigation that MetLife had asserted for denying his benefits). AR 947. However, MetLife had not yet begun to consider the substance of Mr. Gordon's disability claim.

On April 4, 2012 Plaintiff faxed MetLife several completed forms that MetLife had sent to him to fill out. AR 961.

Three months later, on July 3, 2012, MetLife finally hired a doctor to review Mr. Gordon's claim file. AR 919. The Doctor hired by MetLife was a psychiatrist named Lee Becker. Dr. Becker was paid $742.50 to review Plaintiff's claim and prepare the report and addendum. "In 2012, MetLife paid Dr. Becker $102,506.25 for disability claim reviews. In the two calendar years preceding Dr. Becker's review, MetLife paid Dr. Becker $114,345 for disability claim reviews in 2011 and $118,635 for disability claim reviews in 2010." See Exhibit 2, p.8/11-14**.**

In his report Dr. Becker noted that doctors who treated and examined Mr. Gordon when he stopped working (such as Drs. Abarbanel, Koopman, and Meade) opined that he could not work due to his mental/psychological symptoms. Dr. Becker noted regarding a worker's compensation psychiatric evaluation by Dr. Michael Meade from March 21, 2003, "**The clinician opines that there is ample medical evidence on today's examination to establish that the patient is currently temporarily totally disabled on a psychiatric basis**." AR 925, emphasis added. Dr. Meade's report is found at AR 1145, and it also states, "*Objective findings* – Mental status examination indicative of severe depression, with prominent secondary symptoms of anxiety and panic. **The patient has significant compromise in short term memory and concentration abilities."** AR 1155, italics in original, bold emphasis added.

Based only on the records of doctors who examined Mr. Gordon and found him to be disabled, Dr. Becker concluded that Mr. Gordon was not disabled.

> "Overall, the information available to review did not support significant, global psychiatric functional limitations, along with objective findings, to preclude full-time occupational functioning from the date in question forward on an ongoing basis. This is based on a variety of factors, primarily that the information reviewed showed the issues and symptoms were primarily work related and the various progress notes submitted did not describe a pattern of significant impairments in daily functional activities outside the workplace or a pattern of ongoing, significant mental status abnormalities, and therefore a lack of ongoing objective mental health findings supporting." AR 927.

Huh? This is just gobbledygook.

After waiting three months to get Dr. Becker to write a medical review report, MetLife then sat on the report for a full month until August 3, 2012. On August 3, 2012 MetLife wrote to Plaintiff that it had sent copies of the record review report to three of Mr. Gordon's treating physicians (Drs. Abarabanell, Resneck-Sannes, and Kadis) on that day and had given them 2 weeks to respond. AR 917. Later notes from those three doctors indicate that they did not receive any record review report from MetLife regarding Mr. Gordon. AR 813, 814, 815.

On September 7, 2012 MetLife wrote to Plaintiff claiming that it had gotten a response from Dr. Abarbanel on August 4, 2012 and that it had refaxed the report to Dr. Resneck-Sannes and Dr. Kadis. AR 859.

On September 10, 2012 Plaintiff wrote back to MetLife and provided the notes from Drs. Abarabanell, Resneck-Sannes, and Kadis stating that they had not received anything from MetLife regarding Mr. Gordon. AR 812-815.

The record does not contain any response from Dr. Abarbanell dated August 4, 2012, but it contains one dated September 4, 2012. AR 816. In his letter Dr. Abarbanell wrote,

> "[I]t must be said that the nature of the psychiatric injuries resulting from the abusive treatment make it very likely, in my estimation, that Mr. Gordon sustained an ongoing disability…

> Specifically, his mood disorder (by my thinking best diagnosed as Major Depressive Disorder, Recurrent, 296.32) and his anxiety disorder (by my thinking best diagnosed as an anxiety disorder with post-traumatic features, 300.00). The former disorder is an ongoing disorder that, once exacerbated as it was, makes it much more likely for it to persist. The latter, almost by definition of the post-traumatic features, tends to persist…"
> My point, then, is that the reports establish the effects, industrially caused, the company's actions precipitated are by their nature very likely to persist." AR 816-817.

An October 9, 2012 addendum by Dr. Becker states, "The additional medical information did not appear to impact the prior psychiatric physician consultant report." AR 797.

On December 7, 2012, more than 8 months after MetLife had begun considering the merits of Plaintiff's claim, MetLife finally deigned to decide Plaintiff's claim. Based on Dr. Becker's record review MetLife determined that Mr. Gordon could have continued to perform the occupation of Senior Staff Systems Programmer. AR 780. That was the position Mr. Gordon was fired from for performance issues. AR 1412. The letter further stated that Mr. Gordon had 180 days from the date he received the denial letter to request an appeal. AR 781. Although Plaintiff would appeal the new reason for the denial of his benefits, MetLife would never decide that appeal. This was effectively MetLife's final decision. "When an administrator tacks on a new reason for denying benefits in a final decision, thereby precluding the plan participant from responding to that rationale for denial at the administrative level, the administrator violates ERISA's procedures… Accordingly, an administrator that adds, in its final decision, a new reason for denial, a maneuver that has the effect of insulating the rationale from review, contravenes the purpose of ERISA." See Saffon v. Wells Fargo, 511 F.3d 1206, 1215 (9th Cir. 2008)

C. MetLife Refuses To Decide Plaintiff's Appeal Again

On December 12, 2012 this Court stayed the current action, and ordered that the case file be administratively closed. Docket # 41. Also on December 12, 2012

Plaintiff sought a copy of the entire administrative record and appealed MetLife's decision to deny Plaintiff's claim. AR 775. MetLife sent the administrative record on December 26, 2012. AR 773.

On May 7, 2013 Plaintiff provided a letter to MetLife summarizing his medical records and pointing out the errors in Dr. Becker's record review report. AR 701. In the letter he pointed out that "all of Mr. Gordon's doctors who treated him for his psychological disability in 2002 and 2003 opined that it was caused by his work, and therefore the disability it caused dated back to the time he was employed at Borland Software and covered under the Plan." AR 701-702. Plaintiff further noted that,

> "Dr. Steven T. Padgitt, Ph.D. wrote a letter on December 9, 2002, stating that besides Mr. Gordon's long-standing history of attention/concentration problems, 'It is also clear from his historical report that he suffers from Post Traumatic Stress Disorder, an anxiety disorder resulting from environmental stress/trauma. The PTSD symptoms are exacerbating his attention and concentration difficulties. This disorder appears related to his work conditions under the employ of Borland Software Corporation.' Dr. Padgitt further wrote, 'He was assessed using Qualitative EEG technology and showed abnormalities when compared to his asymptomatic peers.' Dr. Padgitt, unlike Dr. Becker, examined and treated Mr. Gordon. [AR 1144]" AR 702.

Plaintiff also made clear that his disability was not only psychological.

> "Besides his psychological conditions, Mr. Gordon has also been suffering from chronic back and neck conditions that cause him severe pain since before he became disabled in 2002. A note from Dr. John Catlin from August 28, 1996, states that Mr. Gordon had severe neck pain, and notes the 'his basic problem is one of recurrent cervical and neck pain.'[AR 740].
>
> "In Dr. Zweng's note from April 29, 2002 he indicated that, '[Mr. Gordon] has been on different anti-depressant medications in the past mainly to control his chronic pain issues of his neck and back.' [AR 727]. Throughout 2002 Mr. Gordon was on strong pain medications for his back including Propoxyphene, Napsylate and Neurontin. [AR 741-746]. Neurontin is also prescribed to treat seizures but was prescribed for Mr. Gordon to treat his chronic neck and back pain. [AR 751].
>
> "An MRI report from Los Gatos MRI from August 27, 2003 indicates that Mr. Gordon was suffering from multiple problems with his cervical spine including, at the C5-6 level moderate bilateral neural foramen narrowing, right greater than left, and at C6-7 **severe narrowing of the right neural foramen. [**AR 754]. Electrodiagnostic studies from August 27, 2003 were also consistent with right C6-C7 radiculopathy. [AR 768].
>
> "Dr. Larry Resneck-Sannes filled out a disability form for MetLife in October of 2009, in which he noted that Mr. Gordon, 'has disabling back & neck pain for degenerative disc disease, chronic migraine headaches, failed

> knee & shoulder surgery.' Dr. Resneck-Sannes wrote that he had been treating Mr. Gordon for his disabling condition since March of 2002 and that Mr. Gordon's disability began in February of 2002. [AR 769].
> "Not only is it unreasonable to assume that Mr. Gordon's disabling physical conditions appeared overnight in August of 2003, but the record clearly shows that Mr. Gordon had been suffering from severe neck and back pain since at least 1996. The record is clear that Mr. Gordon's neck and back condition have only worsened." AR 704-705.

See Jebian v. Hewlett-Packard Co. 349 F.3d 1098, 1110 (9th Cir. 2003)("A trier of fact […] could infer that functional limitations confirmed by treating physicians in June 1997, May 1998, and September 1998, more likely than not existed in March 1998 as well, rather than disappearing before March 1998 and reappearing thereafter.")

On June 3, 2013 Plaintiff provided MetLife with additional medical records. AR 689.

On June 19, 2013 MetLife wrote to Plaintiff and indicated that it needed more time to decide his claim. AR 688.

On August 2, 2013 Plaintiff submitted a letter from his cardiologist, Dr. Singh, noting that upon reviewing Mr. Gordon's records from 2002 it is probable that Mr. Gordon "had heart disease for many years, possibly even 10 to 15 years." AR 684-685. This correlates with Mr. Gordon's complaints of heart palpitations in 2002. AR 1113, 1119, 1126, 1130.

On August 28, 2013 MetLife sent Plaintiff copies of the most recent record reviews it had commissioned. AR 598. One record review was written by psychiatrist Dr. Peter Sugerman. MetLife paid Dr. Sugerman $1,440 to write the record review and three later addenda. "In 2013, MetLife paid Dr. Sugerman $151,000 for disability claim reviews. In the two calendar years preceding Dr. Sugerman's [2013] review, MetLife paid Dr. Sugerman $143,680 for disability claim reviews in 2012 and $153,000 for disability claim reviews in 2011." Exhibit 2, p.8/19-22.

In his report from July 16, 2013, Dr. Sugerman wrote, "Comments by this reviewer about these data **exclude the concept of psychological injury due to a**

work situation." AR 604, emphasis added. The Plan does not contain a limitation on benefits if disability is caused by a work situation. There is no good reason for Dr. Sugerman to exclude medical evidence generated in the course of a workers compensation claim, such as Dr. Meade's report. Amazingly, without having ever examined or treated Mr. Gordon, Dr. Sugerman determined that Mr. Gordon was not disabled based only on the records of doctors who had found that Mr. Gordon was disabled. AR 604. See Sheehan v. Metropolitan Life Ins. Co., 368 F.Supp.2d 228, 254-255 (S.D.NY, 2005)("Courts routinely discount or entirely disregard the opinions of psychiatrists who had not examined the individual in question at all or for only a limited time… Unlike cardiologists or orthopedists, who can formulate medical opinions based upon objective findings derived from objective clinical tests, the psychiatrist typically treats his patient's subjective symptoms."). See also, Smith v. Bayer Corp. Long Term Disability Plan, 275 Fed.Appx. 495, 508 (6th Cir. 2008); Winkler v. Metropolitan Life Ins. Co., 170 Fed.Appx. 167, 168-169 (2nd Cir. 2006); Lavino v. Metropolitan Life Ins. Co., 779 F.Supp.2d 1095, 1113 (C.D.Cal 2011); Reid v. Metropolitan Life Ins. Co., 944 F.Supp2d 1279, 1316 (N.D.GA 2013); Smith v. Hartford Life & Acc., 2013 WL 394185, *24 (N.D.Cal, 2013).

MetLife also provided a report and addendum written by Dr. Jane T. St. Clair. Dr. St. Clair is board certified in occupational medicine. AR 624. MetLife paid Dr. St. Clair $5,620 to write the record review report and four addenda. "In 2013, MetLife paid Dr. St. Clair $62,730 for disability claim reviews. In the two calendar years preceding Dr. St. Clair's [2013] review, MetLife paid Dr. St. Clair $72,540 for disability claim reviews in 2012 and $33,435 for disability claim reviews in 2011." Exhibit 2, p.8/15-18.

According to Dr. St. Clair's August 2, 2013 report,

"Documentation of his *functional limitations cited* in this review of the documents:

> "a. Dr. Summa (9/2/10) states that he has difficulty walking. 'He cannot stand or sit for very long.' His activities of daily living such as washing dishes and doing laundry have become difficult. His pain (8 out of 10) is worsened with prolonged standing, sitting, and sneezing. At that time he was not taking pain medication.
> "b. Dr. Gennuso (11/14/03) stated that he has pain "in his neck and both shoulders in any type of position when he has to hold his head up, particularly sitting and working at his computer." The pain in the back of the neck radiates to both shoulders and to the outside of both arms. He has numbness in the 3rd, 4th, and 5th fingers of the right hand, causing him to drop things.
> "c. Dr. Blumenfeld (5/29/04) states that 'his symptoms interfere with his ability to be employed and daily activities.'
> "d. Dr. Schiffer (6/9/04) reported that he can stand or sit for five to thirty minutes. He can walk one block without pain and he can continue walking if he rests for fifteen minutes. Lifting is limited to five pounds without pain."
> AR 623.

Dr. St. Clair opined that Mr. Gordon's treatment was consistent with his medical diagnosis. Dr. St. Clair opined, "Physical limitations are poorly supported with objective findings throughout the entire period under review." AR 622.

In an addendum dated August 25, 2013 Dr. St. Clair wrote that, "[Resneck-Sannes] said that Mr. Gordon had a lot of things happen to him over the years he has known him. He has a long history of shoulder and neck problems, and he has osteoarthritis of his knees. He has had several surgeries for these conditions," (AR 624) and "[Gordon] has had various musculoskeletal complaints as long as [Dr. Resneck-Sannes] has known him; it is neck, back, shoulders and knees, and he thinks he has had surgery on all of them." AR 625.

On September 16, 2013 Plaintiff wrote to MetLife and pointed out several discrepancies with the record review reports MetLife had sent and asked several questions about the doctors MetLife had hired to write the reviews. AR 596-597. One discrepancy noted was, "Doctor St. Clair in her report stated that Mr. Gordon's 'only medication was Acylovir.' This is clearly not true as we provided records of his medications indicating that he was prescribed Propoxyphene, Neurontin, and Darvocet besides Acyclovir. Why didn't Dr. St. Clair mention the other medications?" AR 597. Plaintiff also asked how often Drs. St. Clair and Sugerman had been hired by MetLife, and how much MetLife had paid them over the years. AR 596-597.

MetLife never responded to Plaintiff's September 16, 2013 letter and over two months later, on November 22, 2013, Plaintiff asked for an update. AR 595.

After waiting another two months for an update from MetLife, on January 21, 2014 Plaintiff sent another letter to MetLife seeking an update. AR 575. Plaintiff also included a letter dated January 16, 2014 written by Dr. Abarbanel supporting Mr. Gordon's disability claim. Dr. Abarbanel wrote,

> "I have treated Mr. Gordon previously from May, 2002 through June, 2003. I treated him for the psychiatric condition of Major Depressive Disorder with anxiety; I cannot render an opinion regarding his physical condition at that time except to note that he was in pain and on pain medication. Those medications, I should add, exacerbated the functional limitations caused by his psychological condition.
>
> "At the time I treated him he was disabled from doing his work at Borland Software Company due to his psychological conditions. He was suffering from severe depression and anxiety due in 1arge part to the way the management at Borland treated him. At that time, he exhibited many of the symptoms of Post-traumatic disorder from their treatment of him; those symptoms did not disappear when he found himself unemployed and unemployable. His psychological condition affected his ability to concentrate, remember important facts, and to deal with others. He would not have been able to concentrate enough to perform any occupation and could not take instruction or criticism from employers. The anxiety generated by performing any job would have been unbearable for him.
>
> "I have recently seen him on 1-9-14 and 1-16-14. I found at those times that his psychological condition continues to preclude him from work. He has trouble dealing with the stresses of daily life even without the burden of job responsibilities. If he tried to cope with the stresses of a full time job, I believe be would respond with serious depressive and anxiety symptoms." AR 576.

Dr. Abarbanel's letter contained his contact information at the bottom.

On January 27, 2014 MetLife finally wrote to Plaintiff and indicated it was still waiting for the contact information for Mr. Gordon's healthcare providers and stated that if MetLife did not receive a response within 14 days it would continue its review. AR 594.

On February 6, 2014 Plaintiff sent MetLife a letter from Dr. Resneck-Sannes supporting his claim for disability benefits. AR 572. Dr. Resneck-Sannes's letter stated,

> "When Mr. Gordon stopped working for Borland Software in 2002 his care was distributed between this office and a workman's Compensation Claim Office, and various surgical offices. During the time of 2002-2004 he was

> seen 13 times in my office. During that time he had treatment such as shoulder Injections and medication renewals. The pain medications I prescribed were for his neck, back and joint pains requiring various combinations of anti-inflammatory and narcotic preparations. Several of these medications are known to affect cognition and impede focus.
>
> "These conditions, and the pain medications he took because of them, made it hard for Mr. Gordon to work. In 2002 Mr. Gordon's ability to sit still and work at a desk would be limited because of his back problems. Furthermore, his ability to concentrate would have been impeded due to his constant chronic pain and the pain medications he was taking, which are known to affect cognition and focus. In 2002 Mr. Gordon was unable to work a full time sedentary job, especially one that required a lot of focus and concentration. Any other problems Mr. Gordon suffered from would have only exacerbated his disabling condition." AR 574.

Dr. Resneck-Sannes's letter included his contact information in the top right corner. AR 574.

On April 1, 2014 MetLife sent Plaintiff addendums it had hired its record reviewers to write. AR 483.

In his March 17, 2014 addendum Dr. Peter Sugerman opined,

> "The additional information does not alter my opinions of the previous reports.
>
> "The additional information consists of an opinion from a physician that had treated the claimant in the past. This reviewer had read some of the notes and forms in 2002-2003 from this provider during the July review with difficulty, since some of those notes were illegible. In those notes, Dr. Abarbanel had opined that the claimant had difficulties with focus, attention and concentration but did not include any details how this was determined. He submitted an estimated return to work date, suggesting at the time he did not think the claimant was permanently disabled. Dr. Abarbenel then submitted a letter of advocacy dated 9/4/12 expressing that the claimant is most likely disabled ten years later, not entirely consistent with his notes. The purpose of the recent examinations was not explained. If the purpose of the examinations was to render an opinion regarding disability rather than treatment, one would be hard pressed to propose that this constitutes an independent evaluation or opinion. It would appear that this examination might be a legal maneuver to submit an opinion based on direct assessment rather than speculation. If this is not the case, then this reviewer would be curious to understand what purpose this examination does serve." AR 536.

It turns out that Mr. Gordon went to see Dr. Abarbanel in early 2014 because, "[Mr. Gordon's] parents were dying; his mother died in January, 2014 and his father died soon afterwards in February, 2014." AR 330. Also, according to the response written by Dr. Abarbanel on April 18, 2014,

> "I did not provide estimated return to work dates (I provided several as it became clear Mr. Gordon remained disabled) because I did not think Mr. Gordon was permanently disabled. I provided the earliest dates I thought it

possible Mr. Gordon might be able to return to work. In retrospect they were wrong; they were, after all, estimates. What these dates do show is that I thought Mr. Gordon was totally disabled from his job at the time I provided them." AR 330.

Dr. Abarbanel went on to note,

"Fourth, Dr. Sugerman faults me for not providing any "detailed, objective or global mental health data." He does not state what kind of "detailed, objective, or global mental health data" he was looking for. This phrase, in itself, does not have a specific, universal, psychiatric meaning. It is also possible that the data he was looking for, however characterized, in my notes were there but he couldn't read them. In any case, in treating Mr. Gordon, I have diagnosed him with severe depression and anxiety and have noted he exhibits many of the symptoms of Post-Traumatic Stress Disorder. These diagnoses were based on my clinical observations of Mr. Gordon over multiple sessions over the course of several years during which he presented his self-report. Because my clinical observations were consistent with his self-reported problems, I have no reason to doubt the trustworthiness of either; this is standard thinking in the field.

"Finally, based on his review of my records, it seems likely that Dr. Sugerman doesn't treat patients primarily, but rather reviews records for insurance companies. This contrasts to my position as the person who treats and has treated Mr. Gordon directly; Dr. Sugerman's criticism of that position is made irrelevant by the fact that, whereas my interest in the case is to return Mr. Gordon to optimal function, Dr. Sugerman's is to be paid to provide an opinion by an insurance company that seems to be trying not to provide appropriate benefits to Mr. Gordon. Dr. Sugerman's role also may account for his not seeming to understand the realities of what is involved in my evaluation of Mr. Gordon." AR 330-331

Thus, Dr. Abarbanel provided reasonable responses to all of Dr. Sugerman's stated concerns.

In her March 22, 2014 addendum Dr. St. Clair noted,

"Supporting Dr. Resneck-Sannes' letter (1/22/14) and the chronicity of his musculoskeletal pain is the document from Dr. John Catlin dated 8/28/96. At that time the claimant exhibited rude behavior in an attempt to get more MS Contin. He apologized to Dr. Catlin, who then referred him to Dr. Dolf Ichtertz for epidural steroid injections. He had not had these previously. Over the years (perhaps as far back as 20 years), Mr. Gordon has been through multiple doctors, pain clinics, procedures and therapies, but none have offered him sufficient relief. Furthermore, documentation is presented that on 3/7/02, 3/30/02, and 4/23/02 (and additional) his prescription for Darvocet 100mg was filled at the pharmacy. This is the primary pain medication in the review of the 2002 era.

"**The Cervical MRI dated 8/9/03 supports the presence of significant cervical degenerative disc disease**. This MRl documents degenerative findings that include C6-7 hypertrophic changes causing severe right neuroforaminal narrowing and mild narrowing of the central canal. The C5 vertebra has a very small decrease in height. There is mild disc desiccation. The cervical cord had normal signal and configuration. C5-6 showed mild endplate hypertrophic changes, bilateral hypertrophic changes in the uncovertebral joints; there is moderate bilateral neural foraminal narrowing, right greater than left. At C6-7 there is a moderate decrease in disc height and small endplate osteophytes. Right uncovertebral joint hypertrophic changes are present. There is severe narrowing of the right neural foramen. MRI's alone are not useful for determination of pain severity or the use of potent pain killers. **However, this MRI is consistent with the history of slowly developing chronic neck pain**. Also, Dr. Ching (3/7/02) indicated that he had had previous surgery for a cervical fracture, but his [sic] *is* not corroborated elsewhere. The predominant cervical surgery in this file was done by Dr. Fessler on 12/14/04.

"There is a claim that he also has Left Lumbar Radiculopathy (listed with the Diagnoses). The MRI of the Lumbar Spine (8/9/03) documents a small diffuse disc bulge with a small annular tear along the margin. The anterior edge of the thecal sac is mildly flattened. There is very minor bilateral neural foraminal narrowing, left greater than right. The physical exam from Dr. Ching, PMR (3/7/02) reveals no significant abnormality in the 6 paragraphs written[…]

"Dr. Ching performed a consultative visit on 3/7/02 for buttock neuralgia and left shoulder pain (chronic); he diagnosed left rotator cuff tendinitis with impingement. He was referred to physical therapy for scapular stabilization and rotator cuff strengthening. He did not have a clear diagnosis for the left buttock sensations of indeterminate origin.

"Dr. Koopman (4/19/02) describes his physical and mental condition in the weeks prior to his dismissal from the company. He had recently been prescribed Topamax from Dr. Resneck-Sannes for help with anxiety and headaches. His blood pressure was elevated; he was already on Tarka (prescribed for him a few months earlier), so Dr. Koopman (4/19/02) reports that Dr. Resneck-Sannes prescribed Ativan for him recently after having a confrontation with his boss. He was feeling depressed, but he was hesitant to take anti-depressants because previous trials with these had made him feel like he was on amphetamines. **He reported problems with falling asleep, waking up, trouble concentrating and difficulty with his memory**. He was having symptoms that felt like his heart was racing. **Dr. Koopman (4/19/02) noted that he appeared very stressed, to the point that she had difficulty drawing words out of him. On 4/29/02 Dr. Zweng described him as having chronic feelings of irritability and inability to make decisions, sleep disturbances, anxiety, agitation, low mood and tearfulness**. AR 502-503, emphasis added.

Dr. St. Clair further opined,

"The additional review and current opinion of Dr. Resneck-Sannes does not change the facts as presented in this file review. The claimant had problems with the neck, and possibly with other areas: left shoulder; lower back; and left knee. **He has documentation that supports the presence of degenerative disc disease and other problems present prior to the period leading up to the firing from his position. Stress from the working environment would have made his underlying pain feel worse**. The behaviors he described in the workplace (from the immediate supervisor to the HR personnel) could have aggravated the physical condition, making it hard for him to work, as Dr. Resneck-Sannes postulates." AR 503, emphasis added.

Where Dr. St. Clair's opinion goes off the rails is when she opines,

> "He was able to work with his painful conditions, and if his job had not been effectively eliminated, he would have continued to work with chronic pain." AR 503.

Firstly, there is nothing in the record indicating that Mr. Gordon stopped working because his job was effectively eliminated. The record demonstrates that Mr. Gordon was fired because of his actions during a meeting with HR and performance issues, (AR 1412) and his job was not eliminated but was given to another person. AR 401. Dr. St. Clair simply fabricated the job elimination scenario out of whole cloth.

Secondly, that Mr. Gordon had previously performed his job with chronic pain is not evidence that his chronic pain was not disabling.

> "**Standard notes that Ms. Palmer continued to work for almost 15 years while suffering from back and neck pain, and cites that as proof that she was not disabled. It equally tends to prove that she was not malingering**. Palmer v. University Medical Group, 994 F. Supp. 1221, 1236 (Or. 1998), emphasis added, abrogated on other grounds by Hensley v. Northwest Permanente, 258 F.3d 986, 995 (9th Cir. 2001).

Also,

> "The plan's bad argument is that because Hawkins worked between 1993 and 2000 despite his fibromyalgia and there is no indication that his condition worsened over this period, he cannot be disabled. This would be correct were there a logical incompatibility between working full time and being disabled from working full time, but there is not. **A desperate person might force himself to work despite an illness that everyone agreed was totally disabling**." Hawkins v. First Union, 326 F.3d 914, 918 (7th Cir. 2003).

See also General American Life Ins. Co. v. Yarbrough, 360 F.2d 562, 566 (8th Cir. 1966); Wilcox v. Sullivan, 917 F. 3d 272, 277 (6th Cir. 1990); Whatley v. CAN, 189 F.3d 1310, 1313 (11th Cir. 1999); Marecek v. Bellsouth, 49 F.3d 702, 706 (11th Cir. 1995); Mabry v. Travelers, 193 F.2d 497, 498 (5th Cir. 1952). The fact that Mr. Gordon worked with chronic pain does not undermine his disability claim.

On April 7, 2014 MetLife faxed Plaintiff a letter dated April 1, 2014. AR 417. The letter asked that Plaintiff provide a response to the record reviews MetLife had sent him on April 1, 2014 by April 15, 2014. The record shows that this letter was not faxed on April 1, 2014 but was only faxed on April 7, 2014. AR 417, 481. On April 7, 2014 Plaintiff notified MetLife that the letter dated April 1, 2014 had only be received on April 7, 2014 and that he would probably need more time to get responses from Plaintiff's doctors. AR 414. On April 9, 2014 MetLife agreed to allow Plaintiff until April 29, 2014 to provide responses from his doctors. AR 413.

On April 28, 2014 Plaintiff provided MetLife with the response from Dr. Arbarbanel dated April 18, 2014 quoted above. AR 329. Plaintiff also provided a printout from http://mobile.expertwitness.com concerning Dr. Jane T. St. Clair that noted in 23 years of practicing she had only performed 200 exams. AR 332. That's less than 10 medical exams a year.

Plaintiff also notified MetLife that he was still in the process of getting a response from Resneck-Sannes and asked that MetLife not make a decision until Plaintiff could provide it. AR 329. On May 2, 2014 MetLife granted Plaintiff an additional 2 weeks, until May 16, 2014, to provide a response from Resneck-Sannes. AR 404.

On May 16, 2014 Plaintiff provided MetLife with a response from Resneck-Sannes. The letter stated, "I have treated Robert Gordon for over 12 years. 12 years ago I treated him for back pain. **The pain was severe enough to prevent him from working. His job was sedentary at that time and he could not sit for more than a few hours a day. Sitting for longer than 4 hours would exacerbate his back pain.**" AR 399, emphasis added.

On June 18, 2014 MetLife wrote to Plaintiff, and asked that the hand written notes of Dr. Abarbanel, **that Plaintiff had first provided MetLife more than 4 years before** (AR 1092), be transcribed so that MetLife's record reviewers could review them. AR 394. Drs. Becker and Sugerman determined Dr. Abarbanel's clinical opinion was wrong without even being able to read Dr. Abarbanel's notes. On August 6, 2014 Plaintiff provided MetLife transcribed copies of Dr. Abarbanel's notes. The transcribed notes are located at AR 366-374.

On August 25, 2014 MetLife sent Plaintiff more addendum reports from its hired doctors and again asked that Plaintiff's treating physicians review the addendums and submit their comments. AR 339.

In his August 18, 2014 addendum Dr. Sugerman summarized the contents of Dr. Abarbanel's transcribed notes but did not discuss them. AR 342. The addendum from Dr. Sugerman states,

> "The content of these particular document [sic] does not impact the prior opinions. More specifically, the letter from Dr. Abarbenel, excusing the claimant from jury duty, is considered psychiatric data. In the context of this file review, this note is consistent with Dr. Abarbenel's opinion, stated elsewhere in the records, that the claimant was impaired by a psychiatric condition; however, for the purposes of a file review, it does not assist a reviewer to formulate an independent assessment of impairment.
> The additional letters here highlight the presence of comorbid conditions of back pain and a psychiatric condition, although the letters do not address the relationship between the two conditions. A relationship between pain and depression is often present, according to the literature, and would have been worth considering, in retrospect.
> "Finally, the letter from Dr. Abarbenel directed towards this reviewer does not impact the prior reviews. Just to clarify some of the points the letter raises: it is not the role of a reviewer to demand or request more legible records. That onus lies elsewhere. This reviewer appreciates the reasons stated for the claimant's return to treatment years later, and it does suggest that Dr. Abarbenel is sincerely advocating for a patient that he maintains a clinical relationship with rather than simply to satisfy an attorney's work. As for this reviewer's clinical background, more than 60% of work hours are devoted to clinical work. It is my opinion that a reviewer must have a strong clinical background in order to properly address the questions raised in these kind of files." AR 344.

So Dr. Sugerman no longer believed that Dr. Abarbanel was lying, but still thought that Dr. Abarbanel's opinion that Mr. Gordon was disabled was wrong. And Dr. Sugerman made this determination without even having to examine Mr. Gordon and based solely on records of doctors who thought Mr. Gordon was disabled. Dr. Sugerman must be psychic. Otherwise, he must be biased by MetLife paying him almost $450,000 ($447,680) from 2011-2013 (3 years) for writing paper reviews that take at most 40% of his work hours to pump out. Exhibit 2, p.8/19-22.

Dr. Sugerman concluded,

> "This reviewer believes that all the information has been presented by Dr. Abarbenel, who appears to sincerely believe that the claimant was unable to work due to a psychiatric condition. This reviewer has no additional comment or question for the doctor, especially when reviewing clinical material from long ago. It is unlikely that additional information not included in the notes would be valid or available." AR 345

In Dr. St. Clair's June 29, 2014 addendum, she states "The information recently submitted is not new information." The rest of the addendum is spent trying to rehabilitate the problems pointed out with her last addendum. The addendum concludes,

> "In Addendum III, I was making the point that Mr. Gordon had ongoing chronic pain for years and had continued to perform well with minimal medication until 2002. At that time there were additional stressors (personnel changes, changes in expectations, stressful interpersonal interactions) that are well documented in the initial record review. While working under these conditions (chronic pain and work stress), Mr. Gordon was fired from his position (detailed by Dr. Cooper, 5/4/02). He did not have a job to return to, and he had not secured another position. In my Third Addendum, this situation was inaccurately described: 'if his job had not been *effectively eliminated'* (italics mine).
>
> "In my work as a physician reviewer, I do not comment on employment issues, as the questions asked relate to functional abilities. Correctly interpreted, the statement in question would convey the meaning that Mr. Gordon had residual physical abilities in spite of the chronic daily pain he experienced. My interpretation of the situation (from review of the documentation) was that he desired to continue to work, was released to work in another department, and when this was not allowed, he was terminated. Mr. Gordon had the capacity to work in a similar position in a less stressful setting, most likely at another company. Without a new job and with no opportunity to work at Borland, his *work opportunities were limited*, but his ability to work remained physically intact. I have no knowledge whether the company hired someone else for his position or not. The opportunity to work is what was effectively eliminated for the claimant." AR 353.

So Dr. St. Clair thinks that Mr. Gordon wanted to work and could work but didn't work, and when she said his job had been eliminated she just meant that his "work opportunities were limited." Oh, and by the way, Dr. St. Clair does not comment on employment issues.

Notably, Dr. St. Clair never claimed to treat actual patients, and describes herself only as a "physician reviewer." Unlike Dr. Sugerman, Dr. St Clair clearly does not believe that, "a reviewer must have a strong clinical background in order to properly address the questions raised in these kind of files." Like Drs. Becker and Sugerman, though, Dr. St. Clair must be somewhat psychic to determine that Mr. Gordon was not disabled based solely on her review of records from doctors who thought Mr. Gordon was disabled. MetLife sure knows how to pick its reviewing doctors.

MetLife gave Plaintiff 14 days for his physicians to respond to the additional addendum reports from Drs. Sugerman and St. Clair. AR 339. Plaintiff responded the same day and wrote,

> "Please note that Mr. Gordon's doctors are not record reviewers, they do not get paid for every new addendum we ask them to write, and when we call them asking them to yet again justify their clinically based opinions regarding their patients for record reviewing doctors who have never seen those patients, it does not make them happy. (Dr. Sugerman notes that '60% of work hours are devoted to clinical work.' What does he devote the other 40% of his work hours to? Writing record review reports for insurance companies like MetLife?) Even your doctors, who are being paid for every new addendum, do not think that there is anything Mr. Gordon's doctors can provide that would change their minds. Dr. Sugerman wrote 'This reviewer has no additional comment or question for the doctor.'
>
> "Your doctors don' t claim that Mr. Gordon's treating doctors were lying or even that they were wrong. However, they reach the opposite conclusion as Mr. Gordon's doctors regarding his ability to work (Jane T. St. Clair even opines that Mr. Gordon could work while claiming 'I do not comment on employment issues'). It seems the best that a person in the position of your record reviewers could honestly say is, we can't say whether Mr. Gordon was or was not disabled.
>
> "**You have delayed this matter long enough. It is time for you to decide Mr. Gordon's claim. You can either follow the opinions of the record reviewers you have paid who have never seen Mr. Gordon, or the opinions of doctors who have treated Mr. Gordon's conditions for years and written several letters supporting his disability; letters for which they received no compensation. I look forward to your decision.**" AR 336-337, emphasis added.

Plaintiff again sought a decision on October 3 and October 29, 2014. The notes in the record after August 25, 2014 (AR 325-328) don't help to explain why MetLife refused to decide Plaintiff's claim. The notes simply state over and over again "fu w/ARMP" which is used by MetLife claim personnel to mean "follow up with Attorney Response Mount Prospect." Exhibit 3, p.4/9-10. Perhaps MetLife couldn't think of a good reason to follow the opinion of its record reviewers over the better informed and supported opinions of Plaintiffs doctors and hoped that the court would dream one up for them.

On November 12, 2014 MetLife still hadn't decided Plaintiff's appeal and Plaintiff filed a motion to reopen the case. Docket # 42. This Court granted Plaintiff's motion on December 19, 2015. Docket # 45.

On February 11, 2015 Plaintiff file a joint case management statement in which Defendant claimed,

> "Based upon the Court's Order Granting Plaintiff's Motion to Reopen Case, wherein the Court ordered the case restored to active litigation so that it may proceed in parallel to any remaining administrative proceedings, **MetLife is moving forward with rendering its decision and expects to issue the decision within the next week.**" Docket #51, p. 6/19-23, emphasis added.

Despite this claim, MetLife has never decided Plaintiff's appeal.

II. Argument

This Court has previously held that the appropriate standard of review is for abuse of discretion, and the decision to be reviewed is the December 7, 2012 denial. Docket #60, p. 7/19-8/6. That decision was wrong and an abuse of discretion.

A. Mr. Gordon's Medical Records And The Opinions Of The Doctors Who Examined And Treated Him, Are Clear Evidence That He Was Disabled When He Was Fired From Borland.

Mr. Gordon's last day of work at Borland was April 18, 2002, when he went on medical leave. AR 1111, 1410. A treatment note from Dr. Jane K. Koopman from April 19, 2002 states that Mr. Gordon had difficulty even starting to speak, and assessed that he was suffering from a stress reaction with both anxiety and depressive features. AR 1112.

Mr. Gordon attempted to return to work on May 1, 2002 and was almost immediately fired for performance issues and his behavior at a meeting with HR regarding his performance issues. AR 1412. "[Mr. Gordon's] performance records were very good until the most recent evaluation in 2002." AR 503, 731-739.

Following his termination Mr. Gordon was referred to a psychologist, Dr. Steven T. Padgitt, Ph.D., and to a psychiatrist, Dr. Andrew M. Abarbanel. AR 1147. A letter from Dr. Steven T. Padgitt, Ph.D. dated December 9, 2002, states that Mr. Gordon's attention/concentration problems were exacerbated by Post Traumatic Stress Disorder caused by his work conditions at Borland. AR 713. This assessment was made using Qualitative EEG technology. AR713.

Dr. Andrew M. Abarbanel initially evaluated Mr. Gordon on May 15, 2002. Dr. Abarbanel certified Mr. Gordon as disabled due to Major Depressive Affective Disorder on October 4, 2002, January 12, 2003 and April 13, 2003. AR 707-709. Dr. Abarbanel also diagnosed Mr. Gordon with anxiety disorder with post-traumatic features caused by his employment with Borland (AR 710-711) and later explained that the dates he estimated Mr. Gordon may have been able to return to work were just estimates, and in retrospect incorrect, and that "What these dates do show is that I thought Mr. Gordon was totally disabled from his job at the time I provided them." AR 330. On April 2, 2003 Dr. Abarbanel wrote a letter stating that, due to his medical condition, Mr. Gordon was unable to perform his obligation as a juror for two years. AR 400.

On February 21, 2003 psychiatrist and neurologist Dr. Michael Meade examined Mr. Gordon for his worker's compensation claim. AR 714. Dr. Meade wrote, "There is ample medical evidence on today's examination to establish that the patient is currently temporarily totally disabled on a psychiatric basis." AR 724. Dr. Meade further found that it was medically probable that 85% of the stress leading to Mr. Gordon's depressive illness was caused by his treatment at Borland Software. AR 724.

Dr. Resneck-Sannes, who was treating Mr. Gordon's musculoskeletal conditions when he stopped working, wrote,

> "[Mr. Gordon's neck, back and joint pains], and the pain medications he took because of them, made it hard for Mr. Gordon to work. In 2002 Mr. Gordon's ability to sit still and work at a desk would be limited because of his back

> problems. Furthermore, his ability to concentrate would have been impeded due to his constant chronic pain and the pain medications he was taking, which are known to affect cognition and focus. In 2002 Mr. Gordon was unable to work a full time sedentary job, especially one that required a lot of focus and concentration. Any other problems Mr. Gordon suffered from would have only exacerbated his disabling condition." AR 574.

Mr. Gordon was a computer programmer (actually "Senior Staff Systems Programmer). AR 784-785. His job consisted entirely of sitting and concentrating.

Dr. St. Clair agreed with Dr. Resneck-Sannes medical opinion.

> "Supporting Dr. Resneck-Sannes' letter (1/22/14) and the chronicity of [Mr. Gordon's] muculoskeletal pain is the document from Dr. John Catlin dated 8/28/96[...] Furthermore, documentation is presented that on 3/7/02, 3/30/02 and 4/23/02 (and additional) [Gordon's] prescription for Darvocet 100mg was filled at the pharmacy[…] The Cervical MRI dated 8/9/03 supports the presence of significant cervical degenerative disc disease[…] However, this MRI is consistent with the history of slowly developing chronic neck pain." AR 502.

Why wouldn't she agree with Dr. Resneck-Sannes? After all, Dr. Resneck-Sannes examined and treated Mr. Gordon, and Dr. St. Clair never saw Mr. Gordon.

B. MetLife Should Not Have Relied On Dr. Becker's Opinion, Over The Contrary Opinions Of Mr. Gordon's Treating Doctors, To Deny Mr. Gordon's Claim.

Metlife's December 7, 2012 denial of benefits was based solely on the opinion of one record reviewer, psychiatrist Dr. Lee Becker. AR 780. Despite having never examined Mr. Gordon, Dr. Becker disagreed with all the doctors who had examined and treated Plaintiff and found he was not disabled. See Sheehan v. Metropolitan Life Ins. Co., 368 F.Supp.2d 228, 254-255 (S.D.NY, 2005). MetLife never even considered Mr. Gordon's co-morbid musculoskeletal conditions prior to denying his claim.

Dr. Becker's opinion was not truly independent. In 2012 and the two years prior MetLife paid Dr. Becker over $330,000 for disability claim reviews. See Exhibit 2, p.8/11-14.

> "In this case, Dr. Dickerman and Dr. Toenniessen benefited financially from Standard's repeat business. Similarly, it is clear that United Review Services

> was repeatedly rewarded financially by Standard. This evidence demonstrates that Standard failed to use a 'truly independent medical examiner or a neutral, independent review,' as required by Abatie. Abatie, 458 F.3d at 969 n. 7. Therefore, Standard's denial should be viewed with the high skepticism." Oster v. Standard Ins. Co. 759 F.Supp.2d 1172, 1186 (N.D.Cal. 2011)

See also, Rowles V. MetLife, 2012 WL 6590577, *6 (C.D.Cal. 20012)(Finding MetLife erred in relying on record reviewer who had been paid large sums by MetLife over several years and was the only doctor to find Plaintiff was able to work with injury.)

C. MetLife Did Not Provide Plaintiff A Full And Fair Review As Required By ERISA.

29 USC §1133 requires ERISA plans to "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." MetLife is the named fiduciary. 29 CFR 2560.503-1(i)(3) provides ERISA fiduciaries 45 days to either make a determination on a claimant's claim or determine that more time is needed. The Plan states,

> "Metlife will notify you in writing of its final decision within a reasonable period of time, but no later than 45 days after MetLife's receipt of your written request for review, except that under special circumstances MetLife may have up to an additional 45 days to provide written notification of the final decision. If such an extension is required, MetLife will notify you prior to the expiration of the initial 45 day period, state the reason(s) why such an extension is needed, and state when it will make its determination." AR 1507.

MetLife has failed to issue a decision on Mr. Gordon's appeal, "even after the court reopened this case while also providing an opportunity for one to issue" (Docket #60, p7/15-18), and after MetLife told this court it would issue a decision five months ago back in February (Docket #51, p. 6/19-23). MetLife has never even attempted to explain this serious ERISA violation. Docket #60, p.4/18-19.

In Tarasovsky v. Stratify, 2013 WL 2156262, *8 (N.D.Cal 2013) the court held that the ERISA administrator's "failure to timely decide the appeal was *per se* unreasonable." In this case, MetLife has not only failed to timely decide Plaintiff's appeal, **MetLife has completely failed to decide Plaintiff's appeal at all.**

Conclusion

MetLife's December 7, 2012 benefit denial was wrong and an abuse of discretion. Based on the record judgement must be entered for Plaintiff.

Dated: July 22, 2015

Respectfully Submitted:

/s/Paul Fleishman

Paul Fleishman

Counsel for Plaintiff